Supreme Court, U.S.
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No. 95-1944

In The

Supreme Court of the United States

October Term, 1995

PRESLEY L. PIPPIN, JR.

Petitioner,

vs.

ELLEN GAIL BENNETT,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the nexus analysis used by the Fifth Circuit Court of Appeals is appropriate to determine whether an action was taken under color of law pursuant to 42 U.S.C. § 1983.

2. Whether the right to due process under the Fifth Amendment to the United States Constitution is violated in a damage suit prosecuted under 42 U.S.C. § 1983, when, on the morning of trial, the District Court, without prior notice, reinstates long-since dismissed official capacity claims against a defendant, and then insists throughout trial that his attorneys, over their repeated objections that they cannot do so, represent the defendant in both his individual and official capacities, despite conflicts of interest between those two positions.

3. Whether a federal civil litigant is deprived of due process under the Fifth Amendment to the United States Constitution when the trial court shows bias and prejudice against the defendant that affected the outcome throughout the bench trial of the damage suit case.

4. Whether attorneys' fees and expenses awarded to Respondent impermissibly amounted to a windfall for Respondent.

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

No. 95-1944

PRESLEY L. PIPPIN, JR.,

Petitioner,

v.

ELLEN GAIL BENNETT,

Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR CERTIORARI

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 74 F.3d 578 (5th Cir. 1996) and appears as Appendix A of the Appendix to the Petition. The opinion of the District Court is unreported and appears as

Appendix F of the Appendix to the Petition.

JURISDICTION

The judgment of the court of appeals was entered on January 24, 1996. A timely Petition for Rehearing was denied on March 1, 1996 (Appendix B). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

This is a civil rights action filed pursuant to 42 U.S.C. § 1983. In her complaint, Respondent Ellen Gail Bennett alleged that Petitioner Presley Pippin, Jr., acting individually and in his official capacity as Sheriff of Archer County, Texas, sexually assaulted her and thereby deprived her of rights guaranteed by the Fourteenth Amendment to the Constitution of the United States. After a bench trial, the district court entered judgment in favor of Respondent Bennett. The court held Pippin liable in his individual capacity and in his official capacity (i.e. against Archer County, Texas) for $1,000,000 in compensatory damages and $133,235 in attorneys fees. The court assessed $1,000,000 in punitive damages against Pippin, individually.

On appeal, Court of Appeals for the Fifth Circuit, upheld the district court's finding that Pippin's actions were taken under color of state law and affirmed the judgment against Pippin, individually, in all respects. The court found that the County had been denied its right to a jury trial when the official capacity claims against Pippin were reinstated the morning of the trial. Accordingly, the court remanded those claims for a new trial.

The findings of fact and conclusions of law entered by the district court and affirmed on appeal reveal that on the evening of July 2, 1990, Respondent Bennett shot her husband in the chest during the course of a domestic dispute. Ms. Bennett then drove to Wichita Falls, Texas to obtain help for her husband. She was detained by the Wichita Falls Police until Petitioner Pippin came to take custody of her. Pippin turned Ms. Bennett over to his deputies who took her to the Archer County Sheriff's Office and obtained a statement from her regarding the shooting. Ms. Bennett was then asked not to leave the county without the authorization of the Sheriff's office and taken back to her home in the early morning hours of July 3. Shortly thereafter, Pippin, who was still on duty, arrived at Bennett's home and began questioning her about the shooting incident. When the Sheriff touched her in an inappropriate way, she asked him to leave. Bennett then went to bed. The next thing she knew, Pippin was standing over her taking her clothes off. When she protested, Pippin responded that he was the Sheriff and could therefore do what he pleased. When she persisted in objecting, the Sheriff stated, "What are you complaining about? I could have thrown you in jail and sorted it out later." The Sheriff then raped Ms. Bennett.

Several days later, the Sheriff gave Ms. Bennett permission to leave the County and she moved to Austin, Texas. Over the next several months, the Sheriff repeatedly called Bennett to inform her of the pending grand jury proceedings regarding the shooting of her husband and to inquire whether she had told anyone about the rape. When the grand jury finally no-billed her, Ms. Bennett reported the rape to the Austin Police Department.

REASONS FOR DENYING THE WRIT

The decision of the court of appeals is correct and none of the questions presented for review involves a conflict with a decision of any other court of appeals or of this Court. The court of appeals decision represents the application of established legal principals to a highly fact specific situation. Accordingly, review by this Court is not warranted.

1. Petitioner contends that the "nexus" standard used by the court of appeals to determine that Pippin acted under color of law is in conflict with the Tenth Circuit's decision in *D.T. by M.T. v. Independent School District No. 16*, 894 F.2d 1176 (10th Cir. 1990), as well as the analysis of several other circuit courts of appeal. This is simply not the case.

D.T., 894 F.2d at 1188, like this case and a similar Fifth Circuit case, *Doe v. Taylor I.S.D.*, 15 F.3d 443, 452 n.4 (5th Cir. 1994) (en banc) *cert. denied* 115 S.Ct. 70 (1994), recognizes that where there is a "real nexus" between the activities out of which a violation occurs and the official's duties and obligations as a state actor, the official's conduct satisfies the under color of law standard. The difference between *D.T.* and this case lies not in the standard applied but in the facts of the case. In *D.T.* no nexus was found between the sexual assault and the defendant's official duties because the assault and all of the activities leading up to it occurred while the defendant teacher was on summer vacation engaged in non-public school activities. *Id.* at 1186-87. Here, by contrast, the Sheriff was very much on duty at the time of the incident. As the district court recognized, "the entire incident with the Plaintiff arose out of the sheriff's official duties investigating the shooting of Tony Bennett." App. F, Conclusions of Law ¶ 2. The Sheriff met Ms. Bennett and

became aware of her vulnerable position by virtue of his position as the chief law enforcement officer investigating the shooting. He used his position as sheriff to determine that Tony Bennett would remain in the hospital overnight (and thereby ensured that he would be alone with Ms. Bennett), and to control Ms. Bennett's freedom. Moreover, he both implicitly and explicitly used his official power to intimidate her and guarantee her silence about the assault. As the court of appeals noted, under the circumstances of this case "we cannot argue with the district court's observation that 'it was not lost on Gail Bennett (or the Sheriff) that the Sheriff carried the keys to the Archer County Jail with him in his pocket and wielded coercive power over Gail Bennett." App. A. This kind of "[m]isuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken under color of state law." *U.S. v. Classic*, 313 U.S. 299, 326 (1941).

Petitioner's quote from *D.T.*, 894 F.2d at 1197, to the effect that there must be authorization or approval of the government entity, Pet. at 15, does not establish a different legal standard from that used by the Fifth Circuit. Read in context, that quote refers to what must be shown to establish liability by a governmental entity -- a very different question from what must be shown to establish that a particular individual acted under color of law. The Tenth Circuit's standard for determining color of law, expressed on the following page of its opinion, is in no way in conflict with the Fifth Circuit's standard. *Compare D.T.*, 897 F.2d at 1188 *with Doe*, 15 F.3d at 452 n. 4.

Nor does the Fifth Circuit's nexus standard conflict with any of the other cases cited by Petitioner. To the

contrary, both *Delcambre v. Delcambre*, 635 F.2d 407 (5th Cir. 1981), and *Pitchell v. Callan*, 13 F.3d 545, 548 (2d Cir. 1994), apply standards similar to the standard used in this case. Different results obtained simply because the facts of those cases demonstrated that the conduct at issue arose out of and was effectuated through purely personal interactions which had no nexus with any official position or abuse of official power. Here, by contrast, even if the Sheriff's motive for assaulting Ms. Bennett was a personal one, he used the power of his office to accomplish that goal.

The "color of law" question is a highly fact bound one that may not be amenable to more precise legal formulations than the standard definition established long ago in *U.S. v. Classic*, 313 U.S. 299, 326 (1941), and *Screws v. U.S.*, 325 U.S. 91, 111 (1944). The standard articulated by the Fifth Circuit in this case comports with the definition of "under color of law" in those decisions and simply represents an unremarkable application of that definition to the unique facts of this case. In such circumstances, review by this Court is not warranted.

2. Petitioner seeks certiorari to review the question of whether Petitioner was deprived of due process when the trial court required his attorney to represent the County's as well as Petitioner's interests at trial. It is not at all clear that Petitioner Pippin has preserved this issue for review. In his appeal brief, Pippin argued that the reinstatement of the official capacity claims on the eve of trial denied him due process *in his official capacity* (i.e. denied the County due process). He did not appear to argue that the reinstatement of the claims against the County prejudiced him, individually. The court of appeals apparently did not view Pippin, individually, as asserting a due process violation (or found

such an assertion to be frivolous) since it did not discuss such a claim in its opinion. The only discussion of a due process violation was with respect to the County and its assertion that it was denied a jury trial.

Even if the Petitioner has preserved a due process issue for review, he presents no reason why this Court should expend its resources on that question other than to correct alleged error in this particular case. Petitioner cites no conflict in the legal standard for determining whether a conflict of interest exists. He simply argues that, in this particular case, the court of appeals ignored its own standard set forth in *Van Ootegham v. Gray*, 628 F.2d 488, 495 n. 7 (5th Cir. 1980). Even if such error had occurred, that, by itself would not be a proper basis for granting certiorari..

Moreover, there was no error committed when Petitioner's attorney was directed to represent the County's interests, as well as Petitioner's, at trial. To be sure, having one attorney represent both an individual defendant and a government entity in a Section 1983 case can lead to a conflict of interest where the individual defendant admits to acting under color of law but the government entity denies that allegation. *See, e.g. Dunton v. County of Suffolk*, 729 F.2d 903, 907-909 (2d Cir.) *vacated in part on other grounds* 748 F.2d 69 (2d Cir. 1984). However, from the very beginning of the case, both Pippin, individually, and the County took the position that Pippin was not acting under color of law. Thus, no conflict ever arose and Pippin, individually was not prejudiced when his attorney was directed to represent both his and the County's interests. Thus, even if this Court were to concern itself with error correction, there was no error in with respect to this issue.

3. Petitioner seeks review of the Fifth Circuit's refusal to reverse the judgment against him because of alleged bias by the district court. The petition for certiorari identifies no error in the legal standard applied by the Fifth Circuit and does not claim that that standard is in conflict with any decision of this Court or the other courts of appeals. Petitioner simply asks this court to expend its limited resources correcting alleged errors in the Fifth Circuit's application of the legal standard for bias to the particular facts of this case. It is not the function of this Court to engage in error correction in individual cases. Moreover, no such errors exist on the record of this case -- as the Fifth Circuit noted the court was evenhanded in its questioning and its "comments exhibited at most a sense of humor at a bench trial." Ex. F.

4. Petitioner asks this Court to review the award of attorneys fees and costs to Respondent asserting that Respondent's application for fees did not explicitly address all of the factors listed in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974). The Fifth Circuit apparently found this argument so frivolous that it simply affirmed the award without discussing the alleged violations of *Johnson*. The petition for certiorari does not identify any conflict between the courts of appeals regarding the standard for awarding fees and simply asks this Court to substitute its judgment of the proper fee for that of the district court and the court of appeals. Such case specific error correction does not fall within this Court's certiorari jurisdiction.

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be denied.

Respectfully submitted,

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